IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

WRIT PETITION NO.923 OF 1996

1. Kagaz Packaging,
   a partnership firm registered
   under the Indian Partnership Act,
   having its office at 61CD,
   Government Industrial Estate,
   Charkop, Kandivli (West),
   Mumbai 400 067.

2. Ms.Rajul Manoj Shah
   Partner of the petitioner no.1.
   abovenamed having her office at 61CD,
   Government Industrial Estate,
   Charkop, Kandivali (West),
   Bombayu 400 067. Petitioners

versus

1. Union of India,
   (service through the Ministry
   of Law, Justice and Company
   Affairs, Aayakar Bhavan,
   New Marine Lines, Mumbai 400 020).

2. Director General of Foreign Trade,
   Ministry of Commerce, Udyog
   Bhavan, New Delhi 110 011.

3. The Reserve Bank of India,
   having its registered office,
   at Amar Building, Off. P.M.Road,
   Mumbai 400 001.

4. Add. Director General of Foreign Trade,
   Ministry of Commerce, Udyog Bhavan,
   New Delhi. Respondents

Mr.Rajesh Mehta with Mr.S.P.Bharti for the petitioners.

Mr.R.V.Desai, Senior Advocate with Mr.P.S.Jetley,
Advocate for the respondents.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 24th March, 2006

ORAL JUDGMENT (Per R.M.Lodha,J.).

The petitioners, by means of this writ petition, seek to impugn the order dated 19th July, 1996 passed by the Director General of Foreign Trade whereby he

maintained the orders of the Joint Director General of Foreign Trade Bombay and the Additional Director General of Foreign Trade, New Delhi rejecting the application made by the first petitioner for premium in terms of REP Circular No.11/1993 and the amended REP Circular No.14/1993.

2. The first petitioner-M/s.Kagaz Packaging made the application for payment of premium in the following facts and circumstances:

(i) The first petitioner was issued Advance Intermediate Licence No.0304768/1/02/10/1/05 dated 25.05.1992 (for short, 'Licence no.1').

(ii) On the same day i.e. 25/05/1992 the petitioner was issued another Advance Intermediate Licence No.0304769/1/02/10/1/05 (for short, 'licence no.2').

(iii) Licence no.1 was issued to the first petitioner consequent upon a tie up arrangement it had with M/s.Food and Inns Limited which had Advance Licence No.P/L/3466400 dated 24th June, 1991. The said advance licence authorised M/s.Food and Inns limited to import duty free inports under the Duty Exemption Scheme various inputs as specified in the said licence.

(iv) The other licence no.2 was issued to the first petitioner because of the tie up arrangement it had with M/s.Coffee Board, Bangalore which had advance licence

no.P/K/3410417 dated 31st August, 1990. The said advance licence authorised M/s.Coffee Board to make duty free imports under the Duty Exemption Scheme of various inputs as specified in the said licence.

(v) As per the first petitioner, both M/s.Food and Inns Limited as well as M/s.Coffee Board fulfilled their export obligations under the advance licence and the first petitioner received the proceeds from both of them in respect of supply of corrugated cartons as deemed exports under the Export and Import Policy.

(vi) On 5th May, 1993 REP Circular No.11/1993 was issued providing for payment of 8% premium against Advance/Imprest/Gem & Jewellery REP licence. The said circular came to be issued because it was announced by the Government of India that the exporters who had completed their exports and have realised the export proceeds before the introduction of the fully convertibility but have not completed their imports under the Duty Free Licence before 1st March, 1993, shall be given a cash amount equivalent to 8% of their unutilised import licence and in the case of those exporters who completed their exports before 1st March, 1992 and who had not exchanged their REP/Exim scrips before 27th February, 1993 to give them further opportunity to surrender the Exim scrips and receive the premium.

(vii) On 13th September, 1993 REP Circular No.14/1993 was issued making amendment in the REP

Circular No.11/1993 dated 5th May, 1993.

(viii) Upon issuance of REP Circular dated 5th May, 1993, on 12th July, 1993 the first petitioner filed a claim for Rs.8,12,736/- being 20% of CIF value of imports permissible under licence Nos. 1 and 2 issued to it.

3. On 29th November, 1994 the Controller of Imports and Exports, Bombay rejected the claim of the first petitioner on the ground that it was not eligible for payment.

4. The first petitioner preferred appeal against the order dated 29th November, 1994 before the Joint Director General of Foreign Trade. The said appeal came to be dismissed by the order dated 9th March, 1995 on the ground that the said scheme was no longer in existence.

5. The first petitioner preferred Second Appeal aggrieved by the orders of the Controller of Imports and Exports and the Joint Director General of Foreign Trade. The second appeal was also dismissed by the Additional Director General of Foreign Trade by the order dated 6th July, 1995.

6. The first petitioner then filed further appeal to the Director General of Foreign Trade. On 13th November, 1995 the first petitioner was informed that such appeal was not maintainable.

7. The first petitioner filed writ petition before this Court challenging the order dated 13th November, 1995. This Court by the order dated 10th June, 1996 set aside the communication dated 13th November, 1995 and directed the Director General of Foreign Trade to hear the first petitioner and dispose of the appeal on merits by passing the reasoned order.

8. Consequent upon the order of this Court dated 10th June, 1996, the Director General of Foreign Trade heard the first petitioner and by the order dated 19th July, 1996 maintained the orders of the subordinate authorities and held that the first petitioner was not entitled to premium.

9. We heard Mr.Rajesh Mehta, the counsel for the petitioners and Mr.R.V.Desai, the senior counsel for the revenue.

10. Mr.Rajesh Mehta contended that the authorities misdirected themselves in assuming that REP Circular No.11/1993 related to only physical exports as distinguished from deemed exports. According to him, REP Circular No.11/1993 does not exclude deemed exports. He would submit that the deemed exports do not contemplate the physical exports outside India and that the physical exports did take place at the instance of the exporters namely; M/s.Food and Inns Limited and M/s.Coffee Board which held advance licence. These exporters have neither claimed any premium nor were they

eligible to claim any premium against the physical exports that took place in general currency. The learned counsel took us through the Import and Export Policy and the Duty Exemption Scheme and submitted that the deemed exporter or for that matter deemed export is covered by REP Circular No.11/1993 and amended REP Circular No.14/1993. According to him, the shipping bill is used only when export goods are made outside the country and, obviously, in the case of deemed export, there is no question of use of shipping bills and, therefore, in the cases of deemed exports, the requirement of filing the shipping bill for claiming the premium would not arise. Mr.Rajesh Mehta submitted that the circulars namely, REP Circular No.11/1993 and amended REP Circular No.14/1993 are benevolent and, therefore, must be construed that advances the cause of exporters including those who were issued Advance Intermediate Licences and were deemed exporters.

11. On the other hand, Mr.R.V.Desai, the senior counsel for the revenue supported the impugned orders and submitted that the authorities rightly rejected the claim of premium of the first petitioner as it was not admissible on Advance Intermediate Licence.

12. In our view, what is really material and important is: whether the first petitioner fulfills the eligibility for claim of 8% premium under REP Circular No.11/1993 and amended REP Circular No.14/1993. As a holder of Advance Intermediate Licence, the first petitioner, obviously, may be entitled to various

benefits under the Duty Exemption Scheme but that by itself shall not make the first petitioner eligible to the payment of 8% premium. That the first petitioner is holder of Advance Intermediate Licence under the relevant Export and Import Policy is not in dispute. Indisputabely, the petitioner did not physically export the goods during the relevant period but only fulfilled criterion of deemed exports. The short question is, whether the benefit of payment of 8% premium under REP Circular No.11/1993 amended REP Circular No.14/1993 is available to deemed exports, or it relates only to the physical exports. The answer has to be found from the REP Circular No.11/1993 and amended REP Circular No.14/1993.

13. The preamble to REP Circular No.11/1993 reads thus:

> ". It has already been announced that the exporters who have completed their exports and have realised the export proceeds before the introduction of the full convertibility but have not completed their imports under the duty free licences before 1st March, 1993 will be given a cash amount equivalent to 8% of their unutilised import licences. Further, in the case of those exporters who have completed their exports before 1st March, 1992 and who have not exchanged their REP/Exim scrips before 27th February, 1993, will be given a further opportunity to surrender the Exim scrips and to receive the premium of 20% on them.
>
> 2. This matter has been further discussed with the Reserve Bank of India. It has been decided that the work relating to disbursement of premium amount shall be done by the designated Port Licensing authorities."

14. The relevant provision of the Scheme for payment of 8% premium to the extent it concerns the present writ petition reads thus:

"**I. Payment of 8% premium against Advance/Imprest/Gem & Jewellery REP licences**

1. (a) Advance/Imprest licences issued prior to 1.3.93 may be paid a premium of 8% to the extent imports are yet to be made on or after 1.3.93 but is restricted to the permissible imports in proportion to the exports already effected and export proceeds realised prior to 1.3.93.

(b) .....

(c) .....

(d) .....

2. (a) Out of the aforesaid cases, where Advance/Imprest Licences have already been issued, the claims shall be filed with the concerned licensing offices who had originally issued the licences. The application shall be filed in Part-II of the application form. The application form is given in Annexure-I to this circular. Both the copies (exchange control and customs purpose copies) of the relevant licences shall be submitted alongwith the application. The application shall be accompanied by the following documents:-

(i) E.P. Copy of the shipping bill; and

(ii) Bank certificate of exports/realisation.

After verification of genuineness of the case, the concerned licensing offices shall calculate the premium amount and transfer all the papers including the relevant files to the Jt.Director General of Foreign Trade as per the jurisdiction indicated in Annexure-II to this circular for finalisation of the claim and issue of cheque for the premium amount due.

(b) .....

(c) .....

(d) .....

Note:-
(1) .....

(2) Advance licence shall mean the licences issued under Duty Exemption Scheme.

(3) .....

II. .....

III. ..... "

15. Interalia, the aforesaid scheme provides the payment of premium of 8% to the Advance/Imprest licence issued prior to 1st March, 1993 to the extent imports were yet to be made on or after 1st March, 1993, but restricted to permissible imports in proportion to the exports already effected and export proceeds realised prior to 1st March, 1993. The licence holder covered thereby is required to make an application to the concerned Licensing Officer who had originally issued the licence. The application has to be made in the form prescribed under the scheme and the copies of the relevant licences have to be annexed along with the application. The scheme necessitates the application to be accompanied by (i) EP copy of the shipping bill and (ii) Bank certificate of export/realisation. The submission of EP copy of the shipping bill and the Bank certificate of export/realisation are mandatory as is clear from the use of word ‘shall’. Obviously, EP copy of the shipping bill can only be submitted by the exporter who physically exported the supplies. Thus, from the scheme provided in REP Circular No.11/1993, it is clear that premium is eligible for the physical exports and not to the deemed exports. As a necessary corollary, it has to be held that the first petitioner as a holder of Advance Intermediate Licences is not eligible for payment of premium under REP Circular No.11/1993.

16. It is true that REP Circular No.11/1993 was amended by REP Circular No.14/1993 interalia to the following effect:

> "2. Based on the representations received from the trade and industry and in consultation with the Reserve Bank of India, the scheme for payment of premium has been further reviewed and following amendments shall be made in REP Circular No.11/93 dated 5.5.1993 at the appropriate places:-
>
> (1) In paragraph 3.I the following sub-paragraphs shall be added after the existing sub-paragraph (d):
>
> "(e) In respect of certain Advance and Imprest Licences, operation of both exports and imports may have been made partially before 1.3.1992 and partially between 1.3.1992 to 29.2.1993. In such cases, the claim of premium may be considered appropriately as under:-
>
> (i) In respect of exports made and export proceeds realised prior to 1st March, 1992 or where the exchange rate for export proceeds was fixed prior to 1st March, 1992 by virtue of purchase/discount of export bills or booking of the forward sale contract by exporter, claim for premium relating to remittance on imports yet to be made on 1st March, 1993, in proportion to export proceeds realised (or exchange rate for export proceeds fixed) upto 29th February, 1992 may be considered at 20% provided the licence is valid to such purpose on 1st March, 1993. The premium on the remaining balance amount of licence will be at 8%;
>
> (ii) In respect of export proceeds realised in advance prior to 1.3.1992 and export made subsequent to that date, claim for premium relating to the remittances yet to be made on 1.3.1993 for the imports, in proportion to the exports proceeds realised in advance, may be considered at 20%, provided the licence is valid for such purpose on 1.3.1993; and
>
> (iii) In respect of export proceeds realised in advance between

1.3.1992 to 28.2.1993 and exports thereagainst made on or after 1.3.1993, claim for premium relating to the remittances on import in proportion to such exports proceeds realised in advance may be considered at 8% provided the licence is valid for such purpose on 1.3.1993.

(2) In paragraph 3.II, the following shall be added at the end of both sub-paragraphs (1)(a) and (1)(b):

"This shall also be applicable where the export proceeds were realised prior to 1.3.1992 but the exports were completed after that date or where the exchange rate for export proceeds was fixed prior to 1.3.1992 in respect of exports made upto 29.2.1992 but proceeds were realised later."

(3) In paragraph 3.II, the words "Gem & Jewellery Exim Scrips/REP Licences in respect of which proceeds were realised prior to 1st March, 1992", shall be added after the words "Special REP Licences," in Note (1).

(4) .....

(5) .....

(6) .....

(7) .....

(8) ..... "

17. The aforesaid amendment does not amend the requirement as provided in clause (2)(a) of paragraph I of REP Circular No.11/93..

18. We, thus, find no error in the consideration of the matter by the authorities in rejecting the first petitioner’s claim for payment of 8% premium against the Advance Intermediate Licence issued to it on 25th May, 1992.

19. The result is that writ Petition is liable to be dismissed and is dismissed with no order as to costs.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)